A

Public Prosecutor v Sim Wei Der & Ors

B HIGH COURT (JOHOR BAHRU) — CRIMINAL APPLICATION NO JA-43–36–05 OF 2023
NOOR HAYATI JC
12 SEPTEMBER 2023

C *Evidence — Witness — Recalling of — Application by public prosecutor for review of sessions court judge's decision in dismissing application to recall two prosecution witnesses — Whether sessions court judge properly exercised his discretion in denying application — Whether sessions court judge was correct in citing case of Public Prosecutor v Ramli bin Shafie [2002] 6 MLJ 153 as authority*
D *that recalling of witnesses to treat them as hostile and to impeach at this stage should not be allowed*

By a letter, the deputy public prosecutor ('DPP') sought a review of the decision of the sessions court judge ('SCJ') in dismissing its application to recall
E two prosecution witnesses ('the two witnesses') in the ongoing trial of five criminal cases before the sessions court. The DPP stated that an oral application was made before the SCJ asking the SCJ to exercise his discretion under s 425 of the Criminal Procedure Code ('the CPC') to recall the two witnesses to adduce additional evidence as it was essential for the just
F determination of the case and in the interest of justice. It was submitted that the SCJ's refusal was thus incorrect and inconsistent with the provision of the law. Hence, this application by the DPP for this court to exercise its discretion under ss 323/325 of the CPC to review the SCJ's decision as being erroneous, which resulted in a miscarriage of justice to the prosecution to adequately
G present their case in the said ongoing trial. The respondents vehemently opposed the application, claiming that the DPP did not come with clean hands. They submitted that the DPP misled the court by concealing the real reason(s) for the recall and what had transpired before the SCJ. The respondents further argued that the only reason for the recalling was to treat the
H two witnesses as hostile and to impeach them for their contradictory testimonies. The issues for determination were: (a) whether the SCJ had properly exercised his discretion in denying the application because the DPP had not indicated what additional evidence he wished to elicit from the two witnesses and to what extent it would be essential; and (b) whether the SCJ was
I correct in citing the case of *Public Prosecutor v Ramli bin Shafie* [2002] 6 MLJ 153 as authority that recalling of witnesses to treat them as hostile and to impeach at this stage should not be allowed as this would give the DPP a 'second bite at the cherry' and such application was 'emergency repairs' in nature.

Held, dismissing the application:

(1) It was incumbent upon the DPP to show that the SCJ had improperly exercised his discretion in denying their motion to recall the witnesses. The SCJ would be the best person to understand the facts presented by the two witnesses, having heard the testimony. Unless the DPP could clearly state what evidence he sought to adduce, there was no error or mistake on the part of the SCJ in deciding to deny the application. In exercising his discretion, the SCJ was permitted or at liberty to inquire what was necessary to his satisfaction in order to make a decision. Since the exercise of recalling a witness was discretionary in nature, there was no error or mistake on the part of the SCJ to enquire about the relevance of recalling the witnesses (see paras 19–22 & 24)

(2) The reasons given by the DPP in the letter and again in open court, that the DPP would like to ask further questions about the operations of the factory and depending on the answer given, which the DPP could not predict, would then 'most likely' consider to impeach them. The DPP agreed that they could not speculate, thus they would have to re-examine the witnesses. This was not an acceptable reason. Requesting to ask further questions to lure and entice the witnesses to contradict themselves would be an act to elicit prejudicial testimony of a witness to be used against them. Additionally, the DPP was unsure of what would be the action or next step they would want to endeavour if the witnesses were to be recalled (see paras 41–42).

[Bahasa Malaysia summary

Melalui sepucuk surat, timbalan pendakwa raya ('TPR') memohon semakan semula keputusan hakim mahkamah sesyen ('HMS') dalam menolak permohonannya untuk memanggil semula dua saksi pendakwaan ('dua saksi') dalam perbicaraan lima kes jenayah yang sedang dijalankan di hadapan mahkamah sesyen. TPR menyatakan bahawa permohonan lisan telah dibuat di hadapan HMS memohon HMS menggunakan budi bicaranya di bawah s 425 Kanun Tatacara Jenayah ('KTJ') untuk memanggil semula dua saksi untuk mengemukakan keterangan tambahan kerana ia adalah penting untuk penentuan adil kes dan demi kepentingan keadilan. Adalah dihujahkan bahawa penolakan HMS adalah tidak betul dan tidak konsisten dengan peruntukan undang-undang. Oleh itu, permohonan oleh TPR untuk mahkamah ini menggunakan budi bicaranya di bawah ss 323/325 KTJ untuk menyemak keputusan HMS sebagai terkhilaf, yang mengakibatkan kegagalan keadilan kepada pihak pendakwaan untuk membentangkan kes mereka dengan secukupnya dalam kes perbicaraan yang sedang berjalan tersebut. Responden menentang sekeras-kerasnya permohonan itu, dengan mendakwa bahawa TPR tidak hadir dengan suci hati. Mereka berhujah bahawa TPR mengelirukan mahkamah dengan menyembunyikan sebab sebenar panggilan balik dan apa yang telah berlaku di hadapan HMS. Responden seterusnya

A berhujah bahawa satu-satunya sebab untuk memanggil semula adalah untuk menganggap kedua-dua saksi sebagai belot dan untuk mendakwa mereka kerana keterangan bercanggah mereka. Isu-isu untuk penentuan adalah: (a) sama ada HMS telah menggunakan budi bicaranya dengan sewajarnya dalam menolak permohonan itu kerana TPR tidak menunjukkan keterangan B tambahan yang ingin diperoleh daripada kedua-dua saksi itu dan sejauh mana ia perlu; dan (b) sama ada HMS betul dalam memetik kes *Public Prosecutor v Ramli bin Shafie* [2002] 6 MLJ 153 sebagai autoriti bahawa memanggil semula saksi untuk menganggap mereka sebagai belot dan untuk mendakwa pada peringkat ini tidak sepatutnya dibenarkan kerana ini akan berikan TPR C peluang kedua dan permohonan sedemikian adalah bersifat 'pembaikan kecemasan'.

Diputuskan, menolak permohonan:

D (1) Adalah menjadi tanggungjawab TPR untuk menunjukkan bahawa HMS telah menggunakan budi bicaranya secara tidak wajar dalam menafikan usul mereka untuk memanggil semula saksi. HMS akan menjadi orang yang terbaik untuk memahami fakta yang dikemukakan oleh dua saksi itu, setelah mendengar keterangan itu. Melainkan TPR boleh E menyatakan dengan jelas apa keterangan yang ingin dikemukakannya, tidak ada kekhilafan atau kesilapan di pihak HMS dalam membuat keputusan untuk menolak permohonan itu. Dalam menggunakan budi bicaranya, HMS dibenarkan atau bebas untuk bertanya apa yang perlu untuk penyelesaiannya membuat keputusan. Memandangkan F pelaksanaan memanggil semula saksi adalah mengikut budi bicara, tidak ada kehilafan atau kesilapan di pihak HMS untuk bertanya tentang kaitan memanggil semula saksi (lihat perenggan 19–22 & 24).

(2) Alasan yang diberikan oleh TPR dalam surat dan sekali lagi di mahkamah terbuka, bahawa TPR ingin bertanya soalan lanjut mengenai operasi G kilang dan bergantung kepada jawapan yang diberikan, yang tidak dapat diramalkan oleh TPR, akan 'kemungkinan besar' mempertimbangkan untuk mencabar mereka. TPR bersetuju bahawa mereka tidak boleh membuat spekulasi, justeru mereka perlu meneliti semula saksi. Ini bukan alasan yang boleh diterima. Meminta untuk bertanya soalan lanjut H untuk menarik dan mempengaruhi saksi untuk bercanggah dengan diri mereka sendiri akan menjadi satu tindakan untuk menimbulkan keterangan prejudis seseorang saksi untuk digunakan terhadap mereka. Di samping itu, TPR tidak pasti apakah tindakan atau langkah seterusnya yang mereka mahu usahakan sekiranya saksi dipanggil semula I (lihat perenggan 41–42).]

Cases referred to

Dato' Seri Anwar bin Ibrahim v PP [2002] 3 MLJ 193; [2002] 3 CLJ 457, FC (refd)

Irwan bin Abdullah & Ors v PP [2002] 2 MLJ 577, HC (refd)
Liaw Kwai Wah & Anor v PP [1987] 2 MLJ 69; [1987] 1 CLJ 35, SC (refd)
PP v Amir bin Mahmood & Ors [1996] 5 MLJ 159,HC (refd)
PP v Lin Lian Chen [1991] 1 MLJ 316, HC (distd)
PP v Ramli bin Shafie [2002] 6 MLJ 153, HC (refd)
PP v Sogas Trading [2020] 10 MLJ 258; [2020] 4 CLJ 410, HC (refd)
Phon Nam v PP [1991] 2 MLJ 550; [1991] 1 CLJ Rep 381, SC (refd)
Ramli bin Kechik v PP [1986] 2 MLJ 33; [1986] 1 CLJ 308, SC (refd)
Saravanan a/l Rajagopal & Anor v PP [2019] 2 MLJ 752; [2019] 7 CLJ 202, CA (refd)
Walvin Soundara Nathan v PP [2014] 1 LNS 614, HC (refd)

Legislation referred to

Criminal Procedure Code ss 136(1), 282(d), 283(1)(b), 323, 325, 425
Evidence Act 1950 ss 136, 155

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Joshua Tay H'ng Foong (AmerBON); Subramaniam Nair (Maniam Nair & Co); Manian K Marappan (Manian K Marappan & Co) for the respondents.

Noor Hayati JC:

THE APPLICATION FOR REVISION

[1] By letter dated 23 May 2023 ('the said letter'), the deputy public prosecutor ('DPP') wrote to this court seeking review of the decision of the session court judge ('SCJ') dismissing its application to recall two prosecution witnesses, PW24 and PW25 ('the two witnesses'), in the ongoing trial of five criminal cases before the session court, Johor Bahru.

[2] The DPP states in the said letter that an oral application was made before the SCJ on 22 May 2023, asking the SCJ to exercise his discretion under s 425 of the Criminal Procedure Code ('the CPC') to recall the two witnesses to adduce additional evidence (see para 3.1 of the said letter) as it is essential for the just determination of the case and in the interest of justice.

[3] The DPP further states that the reason for the recalling was 'ingin mengetengahkan keterangan berkenaan dengan tatacara kerja di premis kilang OKT-OKT dan peranan-peranan OKT-OKT dalam menjalankan proses dalam kilang tersebut yang mana ianya terkait secara terus kepada pertuduhan' (see para 3.2).

[4] The DPP refers to the cases of *Ramli bin Kechik v Public Prosecutor* [1986] 2 MLJ 33; [1986] 1 CLJ 308 and *Phon Nam v Public*

Prosecutor [1991] 2 MLJ 550; [1991] 1 CLJ Rep 381 to support their contention that the SCJ should exercise his discretion judicially and allowed the recalling of the two witnesses as the additional evidence was essential for arriving at a just decision of the case. It was submitted that the SCJ's refusal was thus incorrect and inconsistent with the provision of the law.

[5] The DPP now requested for me to exercise my discretion under s 323/325 of the CPC to review the SCJ's decision as being erroneous, which resulted in a miscarriage of justice to the prosecution to adequately present their case in the said ongoing trial.

[6] I requested the minutes and records of the hearing in the session court and allowed both parties to respond to this application. The SCJ had briefly emailed me the reasons for his decision, noting that the grounds were almost identical to those recorded in the notes of the proceedings on the day his decision was announced.

[7] Counsels for the respondents vehemently opposed the application, claiming that the DPP did not come with clean hands. They submitted that the DPP misled the court by concealing the real reason(s) for the recall and what had transpired before the SCJ. Counsels for the respondent further argued that the only reason for the recalling was to treat the two witnesses as hostile and to impeach them for their contradictory testimonies. For this reason, they contended the SCJ was correct in denying the application citing the case of *Public Prosecutor v Ramli bin Shafie* [2002] 6 MLJ 153.

EVALUATION AND FINDINGS

[8] The High Court's power of revision is aimed at correcting a miscarriage of justice arising from a misconception of law, irregularity of procedure, neglect of proper precautions, or apparent harshness of treatment that has resulted in some injury to the due maintenance of law and order or undeserved hardship to individuals (see the case of *Liaw Kwai Wah & Anor v Public Prosecutor* [1987] 2 MLJ 69; [1987] 1 CLJ 35).

[9] In the case of *Public Prosecutor v Sogas Trading* [2020] 10 MLJ 258; [2020] 4 CLJ 410, it was held that the High Court would generally exercise its revisionary powers where, the lower court fails to comply with the provisions of the law, the decision is grossly erroneous, the findings of fact are not supported by evidence, material evidence of the parties are not considered, there has been an error of law or procedure and where the revision is demanded in the interest of public. The primary objective of a revision is to correct a miscarriage of justice which has affected the applicant, and the High Court's powers of revision are to be exercised sparingly and judiciously.

THE ISSUES

[10] The issues for determination in the present application relate, first, to whether the SCJ had properly exercised his discretion in denying the application because the DPP had not indicated what additional evidence he wished to elicit from the two witnesses and to what extent it would be essential, and second, whether the SCJ was correct in citing the *Ramli bin Shafie* case as authority that recalling of witnesses to treat them as hostile and to impeach at this stage should not be allowed as this would give the DPP a 'second bite at the cherry' and such application was 'emergency repairs' in nature.

RECALLING OF WITNESS

[11] Section 425 of the CPC provides as follows:

> Any Court may at any stage of any inquiry, trial or other proceeding under this Code summon any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the Court shall summon and examine or recall and reexamine any such person if his evidence appears to it essential to the just decision of the case.

[12] Undoubtedly, the application of s 425 of the CPC and the powers conferred on the court are inherently discretionary. However, the court must be given a basis for exercising its discretion. The SCJ exercised his discretion and denied the application after hearing both parties, holding that recalling the two witnesses was not essential to a just determination of the case based on the reasons given before him by the DPP.

[13] The SCJ asked for more specifics about the additional evidence the DPP wanted to obtain or seek from the witnesses. The DPP could not clearly justify the need for the recalls, as he wobbled to give an apparent reason. However, the DPP mentioned that he wanted to treat the witnesses as hostile or question their credibility, depending on their response.

[14] The SCJ was unsatisfied with the reasons and believed it was an attempt to repair the prosecution case and decided that such application, to treat a witness as hostile or to impeach, cannot be done once the witness has concluded the three stages of examination and was unconditionally discharged (the case of *Ramli bin Shafie* was referred).

[15] Did the SCJ exercise his discretion judicially and reasonably?

[16] Discretionary comes from the word discretion, which means 'the right to decide something based on one's own judgment'.

[17] In the case of *Irwan bin Abdullah & Ors v Public Prosecutor* [2002] 2 MLJ 577, referring to *Liaw Kwai Wah*, the court, in discussing the discretionary power under s 282(d) of the CPC states as follows:

> In exercising the discretionary power under this section, *the Court must exercise it according to law and not humour. It is to be not arbitrary or vague but legal and regular*. And it must be exercised within the limit to which an honest man, competent to the discharge of his office, out to confine himself. (Emphasis added.)

[18] Similarly, in the case of *Public Prosecutor v Amir bin Mahmood & Ors* [1996] 5 MLJ 159, Abdul Malik Ishak J expressed the view (per curiam) that s 283(1)(b) of the CPC gives discretionary power to the court *to exercise according*.

[19] It is incumbent upon the DPP to show that the SCJ had improperly exercised his discretion in denying their motion to recall the witnesses.

[20] I had perused the notes of proceedings and browsed the evidence of the two witnesses recorded in narratives. It was not in question-and-answer form; thus, whether the question related to the work procedure in the factory and the witnesses' role in the process was posted were not reflected in the notes of the proceeding. However, from the answers, the witnesses explained their duties and position in the factory, and there was evidence of that nature. The SCJ would be the best person to understand the facts presented by the two witnesses, having heard the testimony.

[21] Possibly, the reason why the SCJ is asking for a precise description of the 'additional evidence' that the DPP claims to obtain is because he is convinced that the two witnesses have disclosed or explained enough facts in the interest of justice to help him decide the case justly. Unless the DPP can clearly state what evidence he sought to adduce, I see no error or mistake on the part of the SCJ in deciding to deny the application.

[22] I am not suggesting that such specification is a must, but in exercising his discretion, the SCJ is permitted or at liberty to inquire what is necessary to his satisfaction in order to make a decision.

[23] The DPP submitted that they need not give any specific reason to recall a witness. On this issue, I refer to s 136 of the Evidence Act ('the EA'), which provides as follows:

> When either party proposes to give evidence of any fact, the Court may ask the party proposing to give evidence in what manner the alleged fact, if proved, would be relevant and the Court shall admit the evidence if it thinks that the fact, if proved, would be relevant, and not otherwise.

[24] Since the exercise of recalling a witness is discretionary in nature, I see no error or mistake on the part of the SCJ to enquire about the relevance of recalling the witnesses.

[25] In the Federal Court case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2002] 3 MLJ 193; [2002] 3 CLJ 457, Haidar Mohd Noor FCJ said:

> The wordings above (ie, s 136) are wide for the learned judge to exercise his discretion. It even extends to the power to set aside a subpoena issued against a witness. Raja Azlan Shah J, (as His Highness then was) speaking for the Federal Court, in *Ismail Hasnul; Abdul Ghafar v Hasnul* [1968] 1 MLJ 108 at pp 110 to 111; [1967] 1 LNS 60 said:
>
> > The court possesses inherent jurisdiction to see that this privilege is properly exercised and in a proper case can restrain its abuse.
> >
> > We have examined the record, we cannot say that the learned judge wrongly exercised his power or for that matter abused his power.

[26] In the case of *Walvin Soundara Nathan v Public Prosecutor* [2014] 1 LNS 614, the High Court referred to the book *Evidence Practice and Procedure* (3rd Ed), on s 136 by Augustine Paul and quoted the relevant passage as follows:

> In my opinion, therefore, a party does not have an automatic right to call a person as a witness. The court has the power, and, indeed is duty-bound, to inquire into the relevancy of a proposed witness before he begins to give evidence. The object is to ensure that evidence is confined to relevant facts and does not stray beyond the proper limits of the issue at trial. '... In order to ask a party In what manner the alleged fact, if proved, would be relevant ...' as provided by the subsection, it is necessary for the party to give a summary of the proposed evidence when asked by the court, It is only with such a summary can the court be in a position to rule on the relevancy on the assumption that the proposed evidence will be successfully proved. I interpolate to add that the exclusion of witnesses on the principles that I have discussed is not an infringement of the right of an accused person to defend himself. I say this because such a right can be limited by the provisions of any written law (see *Yusuf Husain v Emperor* AIR [1918] All 189). The Evidence Act 1950 limits the type of evidence that is admissible in a trial including the presentation of a defence. Section 136(1) is the vehicle for excluding evidence that is rendered irrelevant by the Evidence Act 1950. The power of the court under this subsection is therefore clear.

[27] Section 425 relates to the powers of the court to summon or examine any witness, and as decided in the case of *Ramli Kechik*, the discretion given by *s 425 depends on the facts of each case — the main consideration being the essentiality of the additional evidence to a just decision of the case*.

[28] Before me, both parties had the opportunity to persuade the court in their favour with the application of the three authoritative cases (*Phon Nam*, *Ramli bin Kechik*, and *Ramli bin Shafie*). Perhaps I should state my opinion on these cases to reassure both parties of their relevance to this issue.

[29] The Supreme Court, in the case of *Ramli bin Kechik*, the issue was on the recalling of a chemist to identify the species of opium in the possession of the accused/appellant. There was a clear purpose or identified reason given for the recalling. The Supreme Court held that the determination of the species of the plant from which the opium came was essential to the just decision of the case (see p 36).

[30] In explaining the scope of s 425 of the CPC, Mohamed Azmi SCJ states at p 34:

> ... the section is intended to enable the court to get at the truth and to come to a proper conclusion in the matter under inquiry or trial.
>
> ... The object of the section is just as much the prevention of escape of a guilty person through some carelessness of the prosecution or the magistrate as the vindication of the innocence of the person wrongly accused owing to the carelessness and ignorance of one party. If there is the apprehension of justice failing by an erroneous acquittal or by an erroneous conviction the court would be justified in exercising its discretion in calling for additional evidence under this section. Where the court is of the opinion that the evidence of certain witnesses is essential to the just decision of the case, it is bound to summon them, and for this purpose the trial can be adjourned. A just decision under this section does not mean a decision in favour of the defence (see *Rengaswami Naickercase* [1954] CRLJ 123 Madras). Thus, it would not be an improper exercise of the power merely because the evidence taken supports the case of the prosecution and not that of the accused. In our view, by its very nature the discretion to be exercised under s 425 of the CPC depends on the facts of each case — the main consideration being the essentiality of the additional evidence to a just decision of the case.

[31] After discussing the submission of the parties, the Supreme Court reiterates the basic principle in exercising its appellate jurisdiction on the issue, that is:

> Thus, before the court will interfere it must be shown that an essential principle of justice has been infringed in such circumstances as to occasion a substantial miscarriage of justice. The court need not interfere if it considers that no substantial miscarriage of justice has occurred although the issue raised in the appeal might be decided in the appellant's favour.

[32] It was further held in *Ramli Kechik* that the relevancy of the evidence was not in question. That was how the Supreme Court was able to consider the *principle of justice that has been infringed* before deciding whether such infringement has occasioned a substantial miscarriage of justice (see p 37).

[33] The case of *Phon Nam* was reported in 1991 (*Ramli Kechik* was decided in 1986). The High Court, at first instance in *Phon Nam*, had refused the recalling of a witness to clarify the date of service of the chemist reports. On appeal, the High Court was directed to invoke s 425 to recall the witness (PW10) to testify about the service of the two chemist reports. At the end of the prosecution case, counsel for the accused submitted that the service of the chemist reports was still not proven as the signature acknowledging the service was not verified at all. After hearing this submission, the High Court judge again recalled PW10 under s 425 to clarify the dates of the chemist reports. However, the evidence of PW10 failed to clear the issues. The High Court, nevertheless, held that a prima facie case was established, called for the defence and convicted the accused. On appeal, the Supreme Court allowed the appeal, criticised the *third bite* given to the prosecution, which yet failed to *make good of the evidential deficiencies* and reiterated the principle when exercising the discretion under s 425 and further held as follows:

> The real object of the exercise of discretion under s 425 of the Criminal Procedure Code is to enable the Court to arrive at a just decision so that the failure to call for the additional evidence would not result in an erroneous acquittal or in an erroneous conviction. The exercise of the discretion is not an arbitrary decision to favour the prosecution or the defence. The discretion is never intended to make 'emergency repairs' to the prosecution case as correctly stated by Mohtar bin Abdullah J in *Public Prosecutor v Lin Lian Chen* [1991] 1 MLJ 316.

[34] The Supreme Court in *Phon Nam* referred to a High Court decision in *Public Prosecutor v Lin Lian Chen* [1991] 1 MLJ 316 and cited with approval the following decision:

> It is not just and fair to allow the prosecution, after it has closed its case to make emergency repairs to defects in its case caused by its own lack of care in the conduct of its own case. In an adversary trial, the defence is entitled to the benefit of any doubt created in the prosecution case by the prosecution itself.

[35] I agree, though, that this decision can be distinguished from the present case. In this present case, the prosecution has not closed its case as yet. Later, I will explain why this does not matter.

[36] Returning to the third case referred to by both parties, *Public Prosecutor v Ramli bin Shafie* [2002] 6 MLJ 153, this is a High Court case, a decision by Augustine Paul J. In this case, the wife of the accused, PW3, after completing her evidence at the prosecution case, was recalled for further cross-examination by the defence and then re-examined by the DPP. She was discharged as a witness, but on the next date, the DPP requested to recall PW3 to further re-examine her in view of the contradiction in her earlier evidence given in court.

[37] The High Court judge allowed it, and after re-examination, the DPP applied to impeach PW3 under s 155 of the Evidence Act. The High Court refused the application (to impeach) as there is no evidence of a former inconsistent statement made by PW3 within the meaning of s 155 of EA.

[38] The High Court further suggested that the DPP should have taken steps to declare PW3 as hostile pursuant to s 154 instead. The High Court discussed the issue and held as follows:

> It follows that the application made by the learned deputy public prosecutor cannot be sustained as there is no evidence of a former inconsistent statement made by PW3 within the meaning of s 155(c). Perhaps the prosecution ought to have taken the necessary steps to have PW3 declared as a hostile witness pursuant to s 154 of the Act. There is nothing in the section to warrant an inference that only when any previous statement of the witness is available and if he is alleged to have departed from that the court can declare that witness hostile (see *Sahdeo Tanti v Bipti Pasin* AIR [1969] Pat 415). Thus the section is not confined to contradictions in a former statement made by a witness; it also includes evidence given earlier (see *Re Wee Swee Hon, deceased* [1953] MLJ 123; *Yuen Chun Yii v Public Prosecutor* [1997] 3 SLR 57). The permission to treat a witness as hostile can be made at any of the three stages of examination (see *BN Chobe v Sami Ahmad* [1969] 1 Andh LT 32). An application for recalling a witness whose examination is over for the purpose of treating him as hostile and cross-examine him will not be allowed (see *Ammathayarammal v Official Assignee* AIR [1933] Mad 137 *PKDas v State* [1971] ILR 2 Cal 392). The inconsistencies in the evidence of PW3 are therefore matters that go only to her credibility as a witness.

[39] Counsel for the respondent quoted the statement above on the permission to treat a witness as hostile and submitted that it could only be made at any of the three stages of examination, and once over, recalling to treat them as hostile should not be allowed (referring to two Indian cases as authorities). The DPP, however, submitted that regardless of the above reference to the Indian cases, the High Court judge still allowed the recalling.

[40] In the *Ramli bin Shafie* case, the judge was informed of the fact that the witness's testimony was inconsistent with her previous evidence in court. The learned judge therefore found it necessary to recall the witness.

[41] Taking these three cases together, I believe the reasons for recalling the witness (in the above cases) were present and clear. The reasons were before the court and were to be considered. In the present case, I repeat the reasons given by the DPP in the said letter and again in open court, that the DPP would like to ask further questions about the operation of the factory and depending on the answer given, which the DPP cannot predict, will then 'most likely' consider to impeach them. The DPP agreed that they cannot speculate, thus they will have to re-examine the witnesses. In my opinion, this is not an

acceptable reason. Allowing unsureness (on the objective) as a reason for recalling a witness would open the door to uncertainty of action. There should be no element of surprise in a criminal trial.

[42] This is not a case where relevant witnesses are not allowed to be called to justify infringement of the essential principle of justice. They were adequately called and examined, if the DPP had clearly indicated their intention that the witnesses had contradicted their earlier testimonies, which should be within the record/knowledge of the DPP all along, they could have said so simply without hesitation. Requesting to ask further questions to lure and entice the witnesses to contradict themselves would be an act to elicit prejudicial testimony of a witness to be used against them. Such an act or intention is not concurrent with the duty of the prosecution as gatekeepers of criminal justice, which was highly looked at by the public in representing the interest of society at large. I also find that the DPP was unsure of what would be the action or next step they would want to endeavour if the witnesses were to be recalled as he admitted that — 'tujuan kami untuk panggil adalah untuk bertanyakan soalan-soalan baru, Bukan untuk ... sebab pada tahap ini kita tidak tahu lagi berdasarkan soalan-soalan baru tersebut apakah jawaban saksi (notes of proceeding on 3 August 2023).

CONCLUSION

[43] Thus, in the absence of any clear indication of the additional evidence and essentiality to recall both the witnesses PW24 and PW25, it will not assist the court in the just decision of the case. Hence, I find that the SCJ was right and had not committed any error of law when he refused the DPP's application to recall the witnesses (see also *Saravanan a/l Rajagopal & Anor v Public Prosecutor* [2019] 2 MLJ 752; [2019] 7 CLJ 202).

[44] In short, any application for recalling a witness must be clearly grounded. An uncertain reason is embarking into a trial and error attempt by parties, which entitled the trial judge to deny the application as unjustified and not essential to the just decision of the case.

[45] The present application be and is hereby dismissed.

Application dismissed.

Reported by Nabilah Syahida Abdullah Salleh